IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.258 OF 2001

Shri Savlo Shambu Naik,
major of age, married,
agriculturist, resident of
Baag, Sanvordem,Sanguem
Taluka Goa..... PETITIONER

VERSUS

1. Mr.Joaquim Santan Fernandes,
major of age, married,
landlord, resident of
Sanvordem, Sanguem
taluka, Goa;

2. Smt. Shavanti Putu Naik,
aged about 56 years,
housewife, resident of
Vishwamber wadi,
Sanvordem,Sanguem taluka,
Goa;

3. Shri Viswas Sadassiva Naik,
major and his wife,

4. Smt. Visranti Viswas Naik,
major, both resident at
Costi, Sanguem, Goa.....RESPONDENTS.

Shri S.D. Padiyar, Advocate for the Petitioner.

Shri R.G. Ramani, Advocate for the Respondents No.2 to 4.

CORAM : A.S. AGUIAR,J.

DATED : MARCH 21, 2002.

ORAL ORDER

This Revision Application is against the Order dated 30th November,2001 passed by the Civil Judge, Junior Division, Sanguem, in Civil

Miscellaneous Application NO.73 of 2001 in Regular Civil Suit No.13 of 1989, rejecting the Plaintiff's Application for amendment. By the said Application, the Plaintiff sought permission to carry out amendments to the plaint as set out in his Application in Para 2, which is as follows:-

> " On page No.6 at page 25 and at line No.3 of the plaint after the word "one" and before the beginning of the new sentence by word "there" by adding the words "Thus the plaintiff has been openly, continuously, peaceably and without any interruption and as of right using the suit access from the servient property of the Defendant Nos. 2, 3 and 4 inter alia by way of easementary right by prescription"

2. It is submitted by the learned Advocate for the Applicant that no prejudice will be caused to the Respondents by the amendment; that the necessary facts are already embedded in the pleadings and the amendment sought will not be setting up any new case. In fact, the amendment would be only by way of clarification. However, the learned trial Judge has held otherwise.

3. A perusal of Para 10 of the impugned Order would disclose that the trial Judge is of the opinion that the amendment will, in fact, be setting up a new case since the Plaintiff has pleaded the right of easement was by way of necessity and not by prescription. According to the learned Advocate for the Respondents, the facts incorporated in the plaint clearly make out a case of acquisition of the right of easement by way of prescription and therefore the Respondents/Defendants have in their Written Statement pleaded facts opposing the case of the Plaintiff of acquisition of the right of easement by prescription. Unfortunately, the learned trial Judge had framed the issue of acquisition of right of easement of necessity and not of prescription. The learned

trial Judge, after considering the pleadings and the nature of the amendment sought, has concluded that the plea of right of easement of prescription is not consistent with the earlier plea raised by the Plaintiffs, namely, the right of easement of necessity. Learned trial Judge has held that allowing the said amendment, would cause prejudice to the Respondents. Furthermore, that the proposed amendment is beyond the period of limitation and permitting the said amendment would result in injustice being caused to the other side, as right which had accrued to the Respondents by lapse of time, will be taken away.

4. After having heard the learned Advocates for the respective parties, I find no case made out for grant of the said application for amendment. From the arguments or the learned Advocate for the Applicants it is clear that the proposed amendments are unnecessary. In the facts and circumstances set out above, the Applicants ought to have instead asked for re-framing the issue by substituting the issue of acquisition of right of easement of necessity by the issue of acquisition of right of easement by prescription. Despite having made several applications for amendment, no application for

re-framing the issue has been made by the Applicants. Even otherwise, the present Application is not maintainable and cannot be granted. I see no reason to interfere with the impugned Order of the trial Judge dated 30-11-2001. Hence Application rejected and the same is disposed of. Accordingly, the Civil Application also stands disposed of.

(A.S. AGUIAR)
JUDGE.

ac.